ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

RANDY VAUGHT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0512-CR-1234
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
The Honorable Danielle Gaughan, Master Commissioner
Cause No. 49G17-0509-FD-159244

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Randy Vaught appeals his convictions of battery as a Class D felony[1] and domestic battery as a Class A misdemeanor.[2] He questions the sufficiency of the evidence and whether the convictions violate his right to be free of double jeopardy. We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

On September 5, 2005, Vaught hit his wife, Mary, around her left eye twice and scratched her hand when trying to take her car keys from her. Mary called the police. The State charged Vaught with domestic battery as a Class A misdemeanor and battery as a Class D felony.[3] After a bench trial at which Mary testified and photographs of her injuries were admitted, the court found Vaught guilty as charged. The court ordered Vaught to serve three years executed for the Class D felony concurrently with one year suspended for the Class A misdemeanor.

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[1] Ind. Code § 35-42-2-1.

[2] Ind. Code § 35-42-2-1.3.

[3] The Class D felony was charged in two parts. The first part charged Class A misdemeanor battery based on Vaught touching Mary in a "rude, insolent or angry manner" resulting in bodily injury. The second part elevated the charge to a Class D felony based on Vaught's prior conviction of battering Mary.

DISCUSSION AND DECISION

1. Sufficiency of the Evidence

Vaught first alleges the evidence is insufficient to support his conviction of battery because Mary's testimony was incredibly dubious and not corroborated by witnesses.[4] Photographs of Mary's injuries supported her testimony. In light of that evidence, her testimony was not "uncorroborated" and we may not apply the incredible dubiousity rule[5] to find the evidence insufficient. *See, e.g.*, *Murray v. State*, 761 N.E.2d 406, 408-09 (Ind. 2002) (witness's testimony not incredibly dubious even though it conflicted with testimony of other witnesses and was inconsistent with his testimony at pre-trial proceedings).

2. Double Jeopardy

Vaught claims his convictions of both battery and domestic battery violate his right to be free of double jeopardy. He asserts the court initially merged the two Class A misdemeanor crimes, and therefore the court should not have entered a conviction and

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[4] Vaught argues only his "conviction and sentence for Count 2 battery should be vacated" due to insufficient evidence. (Br. of Appellant at 7.) We find his application of this argument only to the Class D felony perplexing in light of his second issue raising an alleged double jeopardy violation because the evidence supporting both convictions is the same. If the same evidence was used to support both convictions, and that evidence was incredibly dubious, it would seem the evidence should have been insufficient to support both convictions.

[5] Under the "incredible dubiosity" rule, an appellate court may, within narrow limits, impinge on the fact-finder's role as judge of the credibility of a witness. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). Our Supreme Court has explained:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (internal citations omitted).

sentenced him for both domestic battery as a Class A misdemeanor and battery as a Class D felony. The State claims the court merged the Class D felony battery with the lesser-included Class A misdemeanor battery, and therefore the court could sentence Vaught for both Class D felony battery and Class A misdemeanor domestic battery. The State has misread the record.

The court bifurcated the charges and first tried Vaught for the two Class A misdemeanor crimes, leaving the D felony enhancement for a second proceeding. At the end of the trial on the A misdemeanors, the court stated: "I find the Defendant guilty of Count One and Count Two, Battery and Domestic Battery. They merge and we have the issue of felony battery." (*Id*. at 52.) So, immediately following trial, the court merged the two Class A misdemeanor verdicts.

Then, the parties addressed the felony enhancement under Part Two of Count Two. Vaught admitted a prior conviction of battery against Mary. The court said, "So then we enter a conviction on Count Three, Battery, as a D felony." (*Id.* at 52-53.) The Chronological Case Summary for the day of trial indicates the court found Vaught guilty of all three crimes, without any mention of merger.

At the sentencing hearing,[6] the court again mentioned merger: "I think I have to sentence him on that domestic battery because those two merge so I am just going to say three sixty-five, three sixty-five suspended." (*Id*. at 79.) It is not apparent from the

[6] The transcript of the sentencing hearing is confusing because in one sentencing hearing, the court was sentencing Vaught for two batteries under this cause number, a felony battery against Mary on another occasion to which Vaught pled guilty under another cause number, and a probation revocation because these crimes violated probation from a third cause.

record which were "those two" verdicts the court was merging – Counts One and Two, or Counts Two and Three. Nevertheless, the court's abstract of judgment indicates Vaught was convicted of Count One, domestic battery as a Class A misdemeanor, and Count Three, battery as a Class D felony.[7]

However, the felony battery allegation was not a third charge. Rather it was the second part of Count Two and elevated the Class A misdemeanor battery to Class D felony battery based on Vaught's prior conviction of battery against Mary. Because the court had already merged Counts One and Two, it could not then enter separate convictions as to Counts One and Three. It had to enter a conviction as to either Count One, domestic battery as a Class A misdemeanor, or as to Count Three, battery as a Class D felony. Accordingly, we are inclined to reverse Vaught's conviction of Class A misdemeanor domestic battery.

A trial court may modify its judgment prior to entry of its written order. *See Coleman v. State*, 490 N.E.2d 711, 715 (Ind. 1986) (court had discretion to amend sentence prior to entry in record book, as long as amended sentence supported by the evidence). Accordingly, we also review on the merits whether Vaught's convictions were based on the same evidence. The Indiana Double Jeopardy Clause is violated "if there is 'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the

[7] We acknowledge it is the court's judgment of conviction and not the "abstract of judgment" form the court provides to the Department of Correction that is the official trial court record. *Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004).

essential elements of a second challenged offense.'" *Pierce v. State*, 761 N.E.2d 826, 829 (Ind. 2002) (quoting *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). Similarly, Vaught's right to be free of double jeopardy would have been violated if he was convicted and punished "for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished." *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002) (quoting *Richardson*, 717 N.E.2d at 56 (Sullivan, J., concurring)).

Therefore, we examine the evidence presented at trial to determine "whether each challenged offense was established by separate and distinct facts." *Bruce v. State*, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001) (quoting *Richardson*, 717 N.E.2d at 53), *trans. denied* 761 N.E.2d 414 (Ind. 2001). The appellant must show more than a remote or speculative possibility that the same facts were used. *Id.* We consider the evidence, charging information, final jury instructions, and arguments of counsel to determine what facts were used. *Id.* Thus, we must decide whether the facts used by the court to establish the essential elements of domestic battery were also used to establish the essential elements of battery.

Mary testified Vaught hit her left eye with either a closed fist or his forearm when she was sitting in her car. Then he scraped her hand when attempting to take her keys from her as she was trying to put them in the ignition. After he took the keys, Vaught pulled her out of the car and punched her in the left eye. This evidence might have supported multiple charges of battery. *See, e.g.*, *Haggard v. State*, 810 N.E.2d 751, 758 (Ind. Ct. App. 2004) (evidence supported two convictions, battery and resisting law

enforcement, because Haggard bit the police officer twice), *trans. denied* 783 N.E.2d 697 (Ind. 2002); *Adams v. State*, 754 N.E.2d 1033, 1035 (Ind. Ct. App. 2001) ("While Adams' act of grabbing Debra could have potentially supported a factually separate battery, justifying a separate conviction, the State elected to base [all of] its charges upon [Adams' throwing a glass ashtray, which hit Debra's head and knocked her unconscious]."); *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997) (set of actions by defendant sufficient to support convictions of both battery by bodily waste and resisting law enforcement where defendant "swung her head back and forth in an attempt to spray the officers with her tears, saliva and nasal secretions[, and defendant] also repeatedly stated that she was not going to jail as she kicked, swung her arms and punched at the officers."). Accordingly, we turn to the charging information and arguments of counsel.[8]

> The State charged Count One, Class A misdemeanor domestic battery, as follows:
>
> > On or about Sept. 5, 2005, in Marion County, State of Indiana, the following named defendant, Randy Vaught, did knowingly in a rude, insolent or angry manner touch, Mar[y] Vaught, another person, who is or was the spouse of the Defendant, is or was living as if a spouse of the Defendant, or has a child in common with the Defendant, and further that said touching resulted in bodily injury to the other person, specifically bruises &/or swelling & or abrasions &/or pain.

(App. at 14.) Part One of Count Two, which charged Class A misdemeanor battery, provided:

> > On or about Sept. 5, 2005, in Marion County, State of Indiana, the following named defendant, Randy Vaught, did knowingly in a rude,

[8] No jury instructions were given, as Vaught waived his right to a jury.

> insolent or angry manner touch, Mar[y] Vaught, another person, and further that said touching resulted in bodily injury to the other person, specifically bruises &/or swelling &/or abrasions &/or pain.

(*Id.* at 15.) Part Two of Count Two, which the trial court referred to as Count Three, alleged Vaught had been previously convicted of battering Mary. (*Id.* at 16.) Those charging documents did not distinguish which act by Vaught supported which battery charge.

The entirety of the State's closing argument regarding the evidence supporting those two charges was:

> Thank you so much. Your Honor, the State believes it has proved beyond a reasonable doubt today that on or about September 5, 2005, Mary Vaught was in the presence of the Defendant and the Defendant put his hands on her. He testified that he did attempt to get in between the door and the car and prevent her from leaving. She has testified that he put his hands on her hands and she couldn't get the keys in the car to even start the vehicle and then when she got out of the car, she was pulled out of the car and he did hit her with his fist in the left eye. The State has presented photos today, verifying that injury did occur. The testimony has been that he was in an angered manner at the time. He was attempting to prevent her from leaving that location. She was taking her daughter – it is not the Defendant's daughter – she had every right to pick up that child and take her home with her. Mr. Vaught is not the adjudicated father nor is he the adopted father of [S].
>
> The State believes it has proven beyond a reasonable doubt that on this day, he did put his hands on her in a ru[d]e, insolent or angry manner. She has testified to pain. We have seen photos of the black eye and also the lacerations and abrasions that were caused by Mr. Vaught and we would ask that the State [sic] find Mr. Vaught guilty.

(Tr. at 48-49.) That argument does not explain why the evidence supports two separate convictions of battery.[9]

In light of the generalized charging informations, the prosecutor's summary argument that did not detail why two convictions were appropriate based on separate acts by Vaught, and the court's initial instinct to merge the two Class A misdemeanor verdicts, we are not convinced "each challenged offense was established by separate and distinct facts." *See Oeth v. State*, 775 N.E.2d 696, 704 (Ind. Ct. App. 2002) (vacating one of two battery convictions because both were based on the same act of hitting the victim on the head with a hatchet, despite evidence indicating victim had two separate head injuries from the hatchet), *reh'g denied*, *trans. denied* 792 N.E.2d 36 (Ind. 2003).

Accordingly, we affirm Vaught's Class D felony battery conviction and vacate his Class A misdemeanor domestic battery conviction.

Affirmed in part and reversed in part.

BAKER, J., concurs.

SULLIVAN, J., concurring in result.

[9] Neither did the State's rebuttal argument explain how the evidence might support two separate convictions of battery.